No. 82-1469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CARL LOCASCIO, et al.,

Petitioners,

v.

TELETYPE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals correctly concluded that the district court did not abuse its discretion when, on the basis of the record before it, it granted Respondent's motion for involuntary dismissal for failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure.

PARTIES

Petitioners are thirty-five individuals, formerly employees of Respondent, who were plaintiffs in the district court and appellants in the court of appeals.[1]

Respondent Teletype Corporation is a wholly owned subsidiary of Western Electric Company, Incorporated. Western Electric Company, Incorporated is a wholly owned subsidiary of American Telephone and Telegraph Company.

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[1] The petition for certiorari does not list all parties to the proceeding in the court of appeals, as required by Rule 21.1(b) of this Court. The names of the Petitioners who were appellants in the court below are: Lorraine A. Amerin; Edward Antonik; Raymond W. Baccus; Stanley C. Black; Walter R. Borchers; Brent D. Braddock; Thomas J. Buckley; Bill R. Cochran; Richard E. Cragg; David Gershberg; William J. Graffy; Adele L. Greb; Walter R. Hajduk; Hubert Hall, Jr.; Alfonso A. Houston; Constantine C. Kokines; William J. Kolberg; Albert G. Komer; Carl Locascio; Frank J. Mortellaro, Jr.; George Musgrove; Howard S. Pack; Emil R. Pawelczyk; Norbert A. Quick; Rudolph H. Reymann; Mary M. Richardson; William M. Seiwert; Galester Sims; Frank D. Solare; Edwin L. Stipley; John M. Strukl; Jack C. Thompson, Jr.; Richard J. Walkowicz; S. J. Wojnicki; and Thomas F. Zurek.

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Respondent Teletype Corporation prays that this Court deny the petition for writ of certiorari seeking review of the decision of the Court of Appeals for the Seventh Circuit reported at 694 F.2d 497. The unreported memorandum opinion and order of the district court is set forth as Appendix B to the petition.

STATEMENT OF THE CASE

Petitioners' statement of the case is materially inaccurate in certain respects.[2] An accurate factual account is important to demonstrate that this case involves only narrow factual issues of importance solely to the parties, and does not warrant review by this Court.

Concerning their first change of counsel, Petitioners assert that Judge Marshall informed them that they would have three months to secure new counsel after their initial attorney, J. Dale Berry, withdrew in June, 1977 (Pet. at 3, 13). The transcript of proceedings held that day reveals, however, that Judge Marshall allowed Berry to withdraw only after Petitioners so insisted (R.A. 35-39)[3] and that, with respect to securing new counsel, Judge Marshall admonished Petitioner Locascio, "don't let the thing sit, now." (R.A. 40.) Whether Petitioners were correct in assuming, as they now aver for the first time, that they had three months to secure new counsel because the next status call was three months later is not an appropriate issue for resolution by this Court. The same transcript also undercuts Petitioners' current assertion (Pet. at 12-13) that Berry's withdrawal was caused by his desire to modify the terms under which he originally had agreed to represent Petitioners (R.A. 37-38).

Petitioners' assertion that none of them "were ever consulted" about or "agreed" to the two-year representation of them by attorney Carponelli (Pet. at 3) is also contrary to the

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[2] Petitioners' statement of the case also is replete with assertions which have no basis in the record. For example, much of Petitioners' account of their dealings with attorneys Karton, Carponelli and Donnelly is presented for the first time in the petition. Petitioners cannot establish diligence in the district court by offering belated explanations of their conduct to this Court.

[3] Citations to (R.A.) are to the appendix filed by Respondent in the court of appeals. Petitioners' appendix in that court is cited as (P.A.).

record. Petitioner Locascio was present in court when Carponelli formally appeared as his attorney, but voiced no protest (R.A. 53-54, 63). Moreover, attorney Karton's later motion to withdraw stated that "At the time Mr. Carponelli was engaged as trial counsel in June 1979, Mr. Karton had informed Plaintiff Locascio, and a small committee of six or seven who were in contact with the larger group, that he was having trouble with his vision and other health problems, and considered it essential to the protection of the interests of all Plaintiffs to engage additional counsel." (P.A. 18.) Karton's motion also contradicts Petitioners' current implication that, at least through May 19, 1981, they expected that Karton would act as their trial attorney (Pet. at 7).

Although Petitioners claim that the district judge should have required Karton to try the case in June of 1981, Petitioners ignore both their April 14, 1981 letter (R.A. 10) to the judge noting that "Our attorneys do not feel that they can represent us fairly" and requesting "an extension of time, so that we may solicit the services of another attorney," and the in-chambers statements by Petitioners in late April which led Judge Getzendanner to point out that "based on statements made by you, Mr. Locasio, it is quite clear that Mr. Karton was not considered appropriate trial counsel in this case." (P.A. 71.)

The petition contains numerous additional statements which do not enjoy record support or which distort the record. Although the petition stresses that Judge Getzendanner doubted whether Petitioners could obtain substitute counsel quickly (Pet. at 15-16), it neglects to mention that Petitioners disagreed and predicted that they would be able to find new counsel (Pet. at 7a). An exhaustive catalogue of all such misleading statements in the petition will not be set forth here. We merely note that a case which involves primarily the issue of what inferences are to be drawn from undisputed facts is not an appropriate case for review by this Court.

REASONS FOR DENYING CERTIORARI

I.

THE PETITION PRESENTS NO SPECIAL OR IMPORTANT REASONS FOR GRANTING CERTIORARI.

Petitioners plainly seek this Court's review because they believe the district court drew the wrong conclusions from the facts before it. The petition does not assert that the court of appeals decision is inconsistent with either the decisions of this Court or those of any other circuit. Indeed, Petitioners' formulation of the question presented for review imputes no errors whatever to the court of appeals. Petitioners do not raise any question of federal constitutional or statutory law, nor do they raise any question of judicial power under the Federal Rules of Civil Procedure on which this Court has not already ruled in *Link v. Wabash Railroad,* 370 U.S. 626 (1962), or *National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639 (1976).

Neither the authority of the district court to dismiss this case under Rule 41(b) of the Federal Rules of Civil Procedure nor its discretion under that rule to impose the sanction of dismissal in appropriate circumstances is at issue here. This case concerns only the question of whether or not the district court abused its discretion by concluding, on the basis of the record before it and its conversations with the parties,[4] that dismissal was appropriate. That issue already has been briefed, argued and decided in the district court and in the court of appeals. The petition here is only a capsulized version of Petitioners' brief to the court of appeals. Petitioners did not file either a motion to reconsider in the district court or a motion for an *en banc* rehearing by the court of appeals. Instead,

[4] As the district court's opinion reveals, the decision to dismiss was based in part on certain in-chambers conferences of which no transcript was made.

Petitioners now ask this Court to perform the review process normally contemplated by such motions. In short, none of the reasons for granting review on writ of certiorari set forth in Rule 17 of this Court are present here. This Court therefore should deny certiorari.

II.

THE PETITION RAISES PRIMARILY NONRECURRING FACTUAL ISSUES IMPORTANT ONLY TO THE LITIGANTS.

This Court should deny certiorari for the further reason that the petition raises no issues of general application. The questions presented for review in the petition are so narrowly focused and so factual in character that their resolution by this Court will offer no guidance whatever to other litigants.

In such circumstances review is properly denied. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925). This Court more recently explained that "the issue of whether there were any violations concerns only a particular order as applied to a discrete set of facts and therefore would not merit this Court's grant of a petition for certiorari." *United States v. ITT Continental Baking Co.,* 420 U.S. 223, 226 n. 2 (1975).

Assuming that Petitioners are correct in their assertion (Pet. at 21) that, given the facts before it, the district court "could have easily imposed" a different sanction, review still is not warranted. The court of appeals correctly applied the principle that an appellate court "cannot substitute its judgment for that of the trial court simply because it might have acted differently in the trial judge's place." (Pet. at 4a). As this Court has explained "The question, of course, is not whether this Court ... would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so

doing." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). *See also Link v. Wabash Railroad*, 370 U.S. 626, 633 noting that "Whether such an order can stand . . . depends . . . on whether it was within the permissible range of the court's discretion." The court of appeals already has held that there was an adequate basis in the record for the district court's order of dismissal (Pet. at 4a). With respect to such factual review and analysis, the rulings of the courts below are entitled to great weight.

The petition itself reveals that the reasoning of the cases just cited applies to this case, for the petition plainly invites this Court to determine:

(i) whether the lapse of time between Berry's withdrawal and Karton's entrance can "be characterized as serious procrastination on the part of Petitioner" (Pet. at 13);

(ii) who was responsible for Carponelli's withdrawal (Pet. at 13-14);

(iii) whether Petitioners had ratified Carponelli's representation of their claims (Pet. at 18);

(iv) whether Petitioners reasonably believed that Karton would try the case after Carponelli withdrew (Pet. at 17); and

(v) whether the disciplinary charges Petitioners filed against Karton were an additional act of delay (Pet. at 14).

Resolution of such factual issues by this Court could not possibly be of importance to any but the present litigants. Certiorari therefore should be denied.

III.

THE DISTRICT COURT'S INVOLUNTARY DISMISSAL OF PETITIONERS' CLAIMS WAS NOT AN ABUSE OF DISCRETION.

Although Petitioners repeatedly assert that the district court abused its discretion, they do not cite a single case involving similar facts in which dismissal was held to constitute an abuse of discretion. Similarly, although Petitioners argue that the district court should have granted them a further trial continuance beyond the one-week continuance which was granted, that argument also is unsupported by citation to any case holding that a refusal to grant such a continuance was an abuse of discretion.[5]

As the two courts below found, Petitioners did indeed exhibit a lack of diligence in prosecuting their case. Their problems in securing new counsel in May and June of 1981 were not isolated events, but were part of a continuing pattern of repeated changes of counsel. Their first attorney's withdrawal occurred after Petitioners wrote Judge Marshall a letter which caused him to conclude that Petitioners were discontented with the attorney (R.A. 37). Attorney Carponelli withdrew after his transmission of Judge Getzendanner's January, 1981 suggestion that the parties consider arbitration ruptured his working relationship with Petitioners (Pet. at 4-5). Attorney Karton withdrew because Petitioner Locascio was a "runaway client" (P.A. 68-69) who had complained in April to Judge Getzendanner about him (P.A. 71) and in May had filed disciplinary charges against him (P.A. 67).

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[5] Petitioners do not even attempt to demonstrate that the authorities on which the district court based its dismissal order were distinguishable or erroneously decided. Those decisions, *Beshear v. Weinzapfel*, 474 F.2d 127 (7th Cir. 1973), and *Hernandez v. United States*, 465 F. Supp. 1071 (D. Kan. 1979), are factually apposite and consistent with this Court's ruling in *Link* v. *Wabash Railroad*, 370 U.S. 626 (1962).

As is apparent from the petition (Pet. at 4-5), the problems between Petitioners and Carponelli surfaced sometime between January 5 and February 24, 1981. Thus, Petitioners had at least three months, and perhaps almost five months, to secure substitute counsel. In that entire time, the thirty-five Petitioners allegedly contacted a total of only three attorneys.[6] Indeed, between May 14, 1981, when Respondent moved to dismiss, and June 8, Petitioners apparently failed to telephone even one attorney to attempt to secure substitute counsel (Pet. at 3a). Those facts justified the district court's conclusion that Petitioners had not been diligent in prosecuting their case in the face of an imminent trial date.

Neither did the district court abuse its discretion by refusing to find that Rossiello's last-minute appearance and professions of eagerness to go to trial cured Petitioners' earlier lack of diligence in prosecution. For several reasons, this contention, Petitioners' so-called "cure" argument (Pet. at 17-18), is without merit. First of all, this Court should decline to reach the legal issue, given the state of the record with respect to the diligence shown by Rossiello. Thus, the court of appeals noted that "the attorney who serendipitously stepped in at the *twelfth* hour . . . failed to appear in time for his own motion call to set a new trial date." (Pet. at 3a; emphasis in original.) Moreover, as the district court noted when his renewed motion was heard a week later, that attorney had had recurring problems meeting time limits in other cases and appeared unfamiliar with the facts of this case at the same time he was professing his eagerness to try it (P.A. 93, 96).

Second, Petitioners' "cure" argument is inconsistent with this Court's observation in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), that sanctions for delay in a particular case are imposed in part to deter dilatory conduct by other litigants in other cases.

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[6] One of the three attorneys allegedly contacted, a Mr. Scheffler of Jenner & Block, apparently does not exist (P.A. 74).

> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.

Id. at 643 (emphasis in original). Because it ignores the deterrence function served by sanctions for delay, Petitioners' "cure" argument has been rejected by various courts. *See Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 43 (2d Cir. 1982); *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1068 (2d Cir. 1979); *Sheaffer v. Warehouse Employees Union, Local 730*, 408 F.2d 204, 205 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 934 (1969).[7] Thus, the district court's refusal to find that Rossiello's fortuitous appearance and professions of diligence mooted his clients' earlier failures to prosecute was not erroneous.

Petitioners' apparent argument (Pet. at i, 20) that the district court abused its discretion by not conducting a hearing to allow them to rebut Respondent's claims of prejudice is both irrelevant and unsupported by any authority. As the lower

[7] The authority on which Petitioners' "cure" argument is principally based, *Marks v. San Francisco Real Estate Board*, 627 F.2d 947, 948 (9th Cir. 1980), is not in conflict with the cited cases. *Marks* turns on the fact that the plaintiff there had "been assiduous in his prosecution," not on a doctrine that subsequent professions of diligence necessarily moot earlier delays. Acceptance of Petitioners' "cure" argument would allow an egregiously dilatory litigant to avoid dismissal simply by promising to reform, thereby crippling the effectiveness of Rule 41(b).

courts' opinions reveal, the extent and degree of prejudice to Respondent by Petitioners' dilatory conduct were not critical factors in either the district court's dismissal of Petitioners' claims or in the Seventh Circuit's affirmance of that dismissal. Petitioners therefore suffered no injury as a result of the district court's refusal to accord them an opportunity to rebut Respondent's claims of prejudice. In any event, Petitioners never sought such a hearing in the district court.

Petitioners cite no authority for the proposition that they had a right to a hearing the denial of which they now protest. Given this Court's holding in *Link v. Wabash Railroad*, 370 U.S. 626, 632 (1962), that no hearing prior to dismissal is required in circumstances where knowledge of the consequences of delay reasonably may be attributed to the dilatory party, Petitioners' claim of entitlement to a hearing on the issue of prejudice lacks merit. *See also Colokathis v. Wentworth-Douglass Hospital*, 693 F.2d 7, 10 (1st Cir. 1982).

Neither do Petitioners establish an abuse of discretion by asserting (Pet. at i, 19) that the district court failed to balance the prejudice to Respondent and the nature of Petitioners' conduct against the public policy favoring trials on the merits. Presumably, Petitioners' argument is that the district court should have recited explicitly that it engaged in such a balancing process, for there is no basis in the record for assuming that the district court's deliberations did not include these factors. In any event, neither *Link v. Wabash Railroad* nor *Moore v. St. Louis Music Supply Co.*, 539 F.2d 1191 (8th Cir. 1976), require that such an explicit recitation be made.

Petitioners also argue that the district court should have imposed a lesser sanction than dismissal (Pet. at 21). That argument also is unsupported by any authority holding that, in circumstances similar to those here, the failure to impose lesser

sanctions is an abuse of discretion.[8] Nor is that argument accompanied by any precise explanation of what lesser sanction should have been imposed. The argument that the district court "could have" granted Petitioners additional time or required a "pro se"[9] trial falls irresponsibly short of establishing that some lesser sanction would have effectively prevented further delays.

Petitioners' lesser sanctions argument also glosses over the fact, as the Seventh Circuit noted (Pet. at 4a), that the district court did impose a lesser sanction, a warning that dismissal was imminent should Petitioners fail to demonstrate diligence. Thus, because it depends upon a distortion of the record and citation to inapposite authorities, Petitioners' lesser sanctions argument does not merit review by this Court.

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[8] *Schenck v. Bear Stearns & Co.*, 583 F.2d 58 (2d Cir. 1978), involved a dismissal when the case was but thirteen months old, not five years as here. Further, unlike *Schenck*, Petitioners here had been warned that dismissal was imminent and had failed to comply with an order to have the case ready for trial at a specified time. *Moore v. St. Louis Music Supply Co.*, 539 F.2d 1191 (8th Cir. 1976), is distinguishable from this case because, as the Eighth Circuit plainly noted, *id.* at 1193, the delays there were attributable to the attorney and not, as here, to the litigants. *Silas v. Sears, Roebuck & Co.*, 586 F.2d 382 (5th Cir. 1978), is also distinguishable because it involved the dismissal without warning of a four-month old action where all of the delay was attributable to the attorney.

[9] This argument also is disingenuous in light of the complete failure of Petitioners to respond to the district court's inquiry as to whether they wanted "pro se" trials (Pet. at 3a).

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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